PROPOSED TOBACCO LITIGATION - ENVIRONMENTAL TOBACCO SMOKE CLAIMS

REPRESENTATIONS TO THE SCOTTISH LEGAL AID BOARD

on behalf of Imperial Tobacco Limited, Gallaher Limited, The Rothmans UK Partnership, Rothmans International Tobacco (UK) Ltd and British-American Tobacco Company Limited

Summary of Representations

It has been reported that applications for Legal Aid are being prepared in respect of claims concerning environmental tobacco smoke (ETS). These claims have emerged as a result of recent media publicity and, in particular, advertisements by solicitors seeking clients. Such activity needs to be balanced in some way and these Representations are therefore submitted in order that the Scottish Legal Aid Board should have before it additional information relevant to the ETS issue.

The claims are without precedent in Scots law and are not supported by the existing scientific evidence. The claimants in such cases face very great difficulties of law and fact in proving breach of duty and causation.

It would be wrong to approach these claims in terms of 'generic' or common issues. Claimants must prove liability on an individual basis. The viability of each and every case needs to be carefully scrutinised.

The cost to the public purse of investigation of the claims and all the evidence is likely to be very high indeed. The Board has to be satisfied that these claims meet the probabilis causa litigandi test and the 'reasonableness' test under Section 14 of the Legal Aid (Scotland) Act 1986. While each case must be considered on its own merits, it is submitted that it is improbable that any applicant will be able to meet the test.

Introduction

1. These representations are intended to bring to the attention of the Scottish Legal Aid Board ("the Board") matters which are relevant to the issue of whether or not to grant Legal Aid funding for a specific category of claims which might be brought in connection with what is sometimes called "passive smoking", that is to say claims for injuries allegedly caused by the presence of environmental tobacco smoke ("ETS"). For convenience we will call such cases "ETS claims".

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2. Following the lodging of a Legal Aid Application, the Board requires to determine inter alia (a) whether the applicant has a probabilis causa litigandi and (b) whether it is reasonable that he should receive Legal Aid.

It is submitted that the approach taken by Sheriff Stoddard in his book "Legal Aid in Scotland" is correct. At 9-19, the author states:-

> *"The Board is unlikely to grant Legal Aid for proceedings which a private client would not pursue, for Legal Aid was never intended to place an assisted person in a more advantageous position than an ordinary fee-paying client, but only to equate their relative positions. This view received judicial support comparatively recently. In McColl v. Strathclyde Regional Council, a lady was granted Legal Aid for a petition to interdict the local authority from adding fluoride to the water supply. After an extensive proof on the petition and answers, her claim was successful. But Lord Jauncey felt obliged to comment unfavourably on the grant of Legal Aid. He observed:-*
>
> > *"There can be no doubt that the petitioner, through the granting of Legal Aid, has been enabled to pursue a litigation of unprecedented length and expense which only an individual with unlimited means at his disposal could have afforded to pursue."*
>
> *He went on to note that the petitioner had been placed in a far superior position to that of a normal person litigating at his own expense, a result which it was extremely doubtful whether the Legal Aid legislation was designed to achieve."*

3. Representations to the English Legal Aid Board in respect of 'active smoking' claims were previously submitted in August 1992 against the background of advertisements (copy attached) by certain solicitors seeking to recruit smokers, ex-smokers and non-smokers as possible claimants. This arose following media publicity of a decision by the Supreme Court of the United States of America on 24th June 1992 in Cipollone v Liggett Group Inc, although as the Board will be aware the plaintiff in that case has now voluntarily discontinued that action. We understand that subsequently some 300 applications for Legal Aid were made in England for claims against tobacco manufacturers: these applications were all refused, and it is reported that all appeals against these refusals have since been rejected.

4. Recently it has been reported that two former employees of Imperial Tobacco Ltd in England (one of the manufacturers on whose behalf these representations are submitted) intend to pursue claims against the company (in its capacity as an employer) in connection with ETS in the workplace.

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Press reports suggest that former employees of other tobacco manufacturers may also file claims. Reports in *The Lawyer* on 2nd February 1993 and *The Law Society Gazette* on 3rd February 1993 suggested that Leigh Day & Co and Bindman & Partners were preparing Legal Aid applications for a dozen or more people who claim to have suffered from others' smoking (See copies attached.) Further interest in ETS claims has recently been generated by the widely reported settlement of a personal injury claim by Ms Veronica Bland against her employers. There has also been the release to the media recently of selected details of an opinion on, inter alia, ETS claims against employers by Mr Patrick Elias QC, reportedly given to the anti-smoking group Action on Smoking and Health (ASH). Further representations on proposed ETS claims have also now been submitted in England, and the Legal Aid Board has confirmed that it will take these into account when considering all further applications relating to such claims. Similar Representations have also recently been submitted to the Northern Ireland Legal Aid Department.

5. Our decision to make submissions to the Board in respect of the substantive issues to be addressed in ETS claims reflects this background and the intense publicity campaigns now being mounted. It is not intended in this document or at this stage to provide exhaustive submissions in the absence of any specific allegations by any claimant. The purpose of these representations is to identify the issues which are likely to arise and some of the difficulties which any ETS claimant must confront. Any litigation which may be commenced is bound to be exceedingly expensive, and although we are unaware of any specific applications for legal aid in this jurisdiction at present, we understand that the proposal is that claimants should be legally aided, and the prospective defenders will have no realistic prospect of recovery of their costs. By the same token, there will also be a heavy burden on the public purse. We seek to assist the Board's consideration of these issues by providing a context for the assessment of any application for funding a claim.

ETS Claims Against Employers

6. The ETS claims currently being publicised concentrate chiefly on what is alleged to be the failure of some employers adequately to protect employees' health when in the workplace. Reliance is placed upon an employer's general common law duty to employees to take reasonable care to ensure their health and safety while at work. In order to succeed in an action against an employer for injuries allegedly sustained as a result of non-smokers working alongside smokers each claimant must succeed on a number of separate issues. Some of these issues are discussed below, although the following is not intended to be a comprehensive list of all the matters a claimant would have to prove.

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Issues of the Duty of Care

7. It is a well established principle that an employer's duty of care to his employees to ensure their health and safety in the workplace is to be assessed in the light of the state of scientific and medical knowledge at the relevant time and not retrospectively: Thompson v Smiths Shiprepairers (North Shields) Ltd [1984] 1 All ER 881. It is important to note that the emergence of scientific studies claiming that ETS might pose a risk to the health of non-smokers is a recent phenomenon. Given this, the apparent inconsistencies in the scientific evidence (discussed below), and the conflicting guidance of authorities, will mean that a claimant will face very considerable difficulty in establishing the existence and breach of an employer's duty of care owed to employees arising from smoking in the workplace.

8. The Government, with the evidence available to it, has not imposed obligations on employers in this area, except specifically in relation to some rest areas where, in compliance with an EC Directive on workplaces, there is a new requirement to have arrangements *"to protect non-smokers from discomfort caused by tobacco smoke"* [emphasis added] which has just come into effect[1]. Today, employers are being encouraged not to *impose* restrictions but rather to undertake consultation with their staff and to seek to establish smoking policies on a consensual basis.

9. The attitude employers should take to smoking therefore remains a subject of public debate, and it is clear that in the absence of authority there is still no consensus on the existence or extent of any duty which employers might have to regulate employees' smoking. It is against this background that a claimant will have to satisfy the Court that the employer in question fell short of the standard of care required at the time when the injury allegedly occurred. Moreover, a claimant would have to establish such a duty in circumstances where such scientific evidence as has emerged is still highly controversial. This will be a very heavy burden, as the test to be applied in such circumstances is what would be done by a "reasonable and prudent" employer, not one who is "extraordinarily solicitous" (Thompson v Smiths Shiprepairers (North Shields) Ltd).

Issues of Causation

10. Establishing individual causation would be an essential pre requisite of liability in an ETS claim and in any personal injury action this is the only relevant question on causation. An investigation of the general question of whether ETS may be capable of causing a particular disease or condition cannot determine liability in any given case. It is simply not sufficient for claimants to present evidence of possible statistically increased risks said to be due to ETS. Statistical evidence cannot prove cause.

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11. These claims are based on two kinds of evidence. First, they rely on an analysis of the available epidemiological data.* Second, they make comparisons between active smoking and ETS.

Epidemiology

11.1 While some epidemiological studies have reported a "statistically significant" association between exposure to ETS and certain diseases, many others have reported no such association. The overall epidemiological data are contradictory and inconclusive. Many of the studies have been criticised in the scientific literature on various grounds, for example: a lack of consistency in the exact medical condition studied and in the reported results; failure to take into account confounding factors such as outdoor pollution, occupational exposures to chemicals, age differences, diet and life-style variables; wrong diagnosis of diseases and use of unreliable questionnaires. Misclassification of smokers as non-smokers in the studies has been identified and suggested as creating statistical biases in the data. To overcome the objection that the bulk of the studies show no statistically significant association some have advocated the use of a procedure (called "meta-analysis") whereby the results of a number of studies are combined in order to obtain an overall estimate of risk. This procedure has been criticised for overlooking fundamental differences among the studies and failing to take adequate account of statistical bias[2].

Lung Cancer

11.1.1 Much of the research into whether ETS might be harmful has been in the area of lung cancer. The argument that ETS increases the risk of lung cancer in non-smokers is largely based on an interpretation of the data from epidemiological studies of non-smoking women married to smokers (spousal smoking). Of the 33 published epidemiological studies on the issue of spousal smoking and lung cancer, none actually measured exposure to ETS; they inferred exposure indirectly by asking questions about contact with smokers. Moreover, more than three quarters of the studies (27 of the 33) reported no statistically significant association between reported exposure to ETS and lung cancer in non-smokers. Most significant for potential claims against employers, however, is that 14 of the published spousal studies also assessed reported workplace exposures to ETS simply by questionnaire (although no actual measurements were conducted). Of the 14 workplace studies, 12 do not report statistically significant associations between ETS and non-smoker lung cancer. In addition, animal inhalation experiments do not support the claim that ETS is a pulmonary carcinogen.

* ie. statistics comparing the prevalence of a disease with the prevalence of other factors in a given population.

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Heart Disease

11.1.2 Twelve epidemiological studies on spousal smoking in the home and the incidence of heart disease in non-smokers are available. These studies, based on marriage to a smoker, are not directly relevant to the workplace issue. In addition, the spousal smoking studies on heart disease contain no data on actual exposure to ETS. Instead, exposure estimates are derived from questionnaire responses. Nonetheless, 5 of the 12 published epidemiological studies on spousal smoking and heart disease did attempt to address workplace exposures to ETS. None of these studies reported a statistically significant increased risk of heart disease among non-smokers claiming exposure to ETS in the workplace. Thus, the existing literature does not provide convincing support for the claim that ETS exposure in the workplace is related to an increase in risk of heart disease among non-smokers.

Respiratory Diseases

11.1.3 The available data on adult respiratory health and ETS are inconclusive. For example, a 1980 report which claimed that non-smokers exposed to tobacco smoke for 20 or more years had reduced function of the small airways compared with non-smokers not so exposed was heavily criticized for questionable data acquisition and analysis. In contrast, a more recent study reported "no evidence" that everyday exposure to tobacco smoke leads to an essential reduction of lung function in healthy adults. Numerous studies of individuals reportedly exposed to ETS have also presented conclusions which appear to contradict those of the 1980 study. The studies which have assessed the possible influence of ETS exposure in asthmatics have also reported inconsistent conclusions. While 2 studies reported an association between asthmatic responses and exposures to ETS, 4 studies reported no objective changes in asthmatics even after prolonged, heavy exposure to ETS.

11.1.4 In 1986 the US Surgeon General[3] concluded that "*a previously healthy individual would not develop chronic lung disease solely on the basis of [exposure to ETS] in adult life*". The Surgeon General reported that even when normal non-smokers were confronted with high doses of ETS in exposure chambers, the changes in lung function were mostly "*quite small*" and that "*it is unlikely that this change in airflow, per se, results in symptoms*". More recently, a scientist[4] considered such results "*too variable ... to permit a conclusion concerning an association between long-term ETS exposure and impaired respiratory health or pulmonary function in non-smoking adults*".

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Comparisons with active smoking

11.2 It is sometimes argued that ETS is essentially the same as the smoke inhaled by a smoker and, therefore, asserted that if active smoking is harmful, ETS - although less concentrated - must also be harmful. A number of scientists have pointed out that one cannot reach valid conclusions concerning probable health effects of ETS from reports about the claimed health effects of smoking on the smoker. The tobacco smoke to which the non-smoker is exposed is qualitatively and quantitatively different from mainstream** and sidestream*** smoke. ETS is a highly diluted, aged and chemically altered mixture of sidestream and exhaled mainstream smoke. This mixture changes as it ages and mixes with other substances found in room air. There are enormous differences in the levels and routes of exposure. For example, typical measurements of ambient nicotine in areas where smoking is permitted ranged from a nicotine exposure equivalent of 1/100 to less than 1/1000 of one filter cigarette per hour[5,6,7&8].

12. Faced with this lack of reliable supporting evidence prospective ETS claimants may seek to rely upon the findings of the Fourth Report of the Froggatt Committee published in 1988[9] and the recent report of the US Environmental Protection Agency ("EPA")[10]. The Froggatt Report considered in particular detail the studies examining whether there is any association between exposure to environmental tobacco smoke and lung cancer. The report stated (in paragraph 68) that, whilst the findings were consistent with there being a small increase in the statistical risk of lung cancer, none of the studies could on its own be accepted as unequivocal. This report's interpretation of the data does not amount to scientific evidence in its own right. The Committee reviewed the same reports as are discussed above (insofar as they had been published at that time) and undertook no independent research of its own. The existence of such 'a statistical association' (if correct) in itself is not sufficient to establish a causal connection between ETS and lung cancer. Moreover, as discussed above, the vast majority of studies in fact report that there is no statistically significant association.

13. Recently, the EPA released a widely publicised report classifying ETS as a "Group A" carcinogen. The EPA largely based this conclusion on a meta-analysis of 11 of the US spousal smoking studies. If the two most recent US studies are added to the EPA's lung cancer database (the EPA omitted them from its consideration), the overall risk determined would have been statistically non-significant. It is also important to note that during the review process the EPA decided to use 90% 'confidence intervals' in concluding that the risk was statistically significant. Generally accepted scientific convention requires the use of 95% confidence intervals. Had 95% confidence

** *Mainstream Smoke*: the smoke inhaled by the smoker.
*** *Sidestream Smoke*: the smoke emitted from the burning tip of a cigarette.

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intervals been used, the results would not have achieved statistical significance. The EPA also relied on the argument that ETS contains substances similar to those alleged to be carcinogens in mainstream smoke. If ETS is considered to be a carcinogen based on the presence of those substances, then many everyday substances, including drinking water, burgers, peanut butter and numerous other products which contain the same constituents, should be classed as carcinogens.

14. The legal test which each claimant must satisfy in order to establish liability is proof that his disease was caused by exposure to ETS, not simply that he is a member of a large class of people postulated as having a small increased statistical chance of disease. Furthermore, where there are one, or more, possible alternative causes of the injury in question and it is not possible to establish which of those possible causes was responsible, causation will not be inferred (Wilsher v Essex Area Health Authority [1988] 1 All ER 871). Thus, where a pursuer's injury is attributable to a number of possible causes, one of which is exposure to a supposed risk blamed on the defender's negligence, the existence of breach of duty and injury does not give rise to a presumption that the defender's conduct has caused the injury. In other words, the claimant must show that "but for" the exposure to ETS the claimant would not have suffered the injury.

15. In any ETS claim there are bound to be a number of possible causes: none of the diseases reportedly associated with exposure to ETS is solely associated with exposure to ETS. Lung cancer, for example, has been statistically associated with numerous risk factors including environmental exposures, genetics, diet, occupational exposures and viruses. Also, the claimed statistical association between lung cancer and certain other factors, for example exposure to naturally occurring radon gas, is equal to or stronger than that claimed for exposure to ETS. Over 300 risk factors have been associated with the development of cardio-vascular disease including high cholesterol, high blood pressure, obesity, stress, lack of exercise and genetic factors. Bronchitis and other respiratory diseases are present widely throughout the community and have many possible causes including viral and bacterial infection, allergies and atmospheric pollution; in some cases there may be congenital factors or underlying abnormalities. Because tobacco smoke is visible and easily identified, it is often blamed for indoor air quality problems; however, many scientific studies have shown that ETS makes a minimal contribution to the concentration of substances and particulates in the indoor environment. Removal of ETS may have little, if any, impact on indoor air quality[11]. Given this plethora of potential causes for diseases alleged to be caused by tobacco smoke, individual causation must be looked at particularly critically when considering the merits of any ETS claim.

16. The claimant must prove on the balance of probabilities that his injury was caused or materially contributed to by the specific defender employer's failure to take adequate precautions (see Wilsher above). Many employees move jobs on a number of occasions throughout their working life and ETS may have been present in varying degrees in each different workplace and occupation. In any individual case the claimant must identify and establish which employer(s)

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caused his alleged injury. It is not sufficient to show that the claimant worked for a number of employers in workplaces where ETS was present. Further, an employer may argue that ETS is present not only in the workplace but also in other situations such as the home, homes of friends and relatives, pubs, clubs and other public places. This must be taken into account in evidencing possible causes of alleged disease other than in the workplace.

17. Recent developments in the Benzodiazepine litigation illustrate the problems that can arise if individual cases are not scrutinised carefully as we have suggested. Doubt as to the viability of the individual cases for which legal aid had been granted led to the English Legal Aid Board requesting a review of every individual case by Counsel under the supervision of the plaintiffs' Steering Committee. As a result of this review, some 1800 claimants who had alleged they were injured as a consequence of taking the drugs Valium and Librium have had legal aid suspended. This was reportedly because they did not meet the merits test, particularly in that they lacked supporting medical evidence. This was after considerable costs had already been incurred on each of the claimants' behalf up to that date, in addition to the substantial extra expense of all the cases being re-assessed. In the meantime related actions in Scotland have not been progressed further. The Board will no doubt recognise that any pursuer in ETS litigation will face overwhelming difficulties in establishing causation in the face of the matters discussed above.

Precedent

18. There has been no case in the UK where an employer has been held liable to an employee in connection with exposure to ETS. The Bland case which has received so much publicity recently has not altered that position. It has been presented by ASH and its supporters as a victory, and a signal that employers will be forced to pay compensation for ETS claims in future. This is not an accurate assessment, for the reasons that have been outlined above. Further, a closer examination into the circumstances of the Bland case demonstrates that the circumstances surrounding the claim were unusual. The case, which was funded by Ms Bland's union, was settled out of Court by the insurers for her employers (Stockport Metropolitan Borough Council), apparently for purely commercial reasons and without any admission of liability. A Stockport local paper (copy attached) has reported the Chief Executive of the Council as saying the Council would have contested the case if it had been given the chance to do so, but the insurers took the decision to settle the case for £15,000: the Council apparently has an excess on its policy requiring it to meet the first £25,000 of most of its claims.

19. Ms Bland joined Stockport MBC in 1979 and is said to have shared offices with smokers until about 1989. She had sinus problems, bronchitis and various other symptoms all of which she claimed were attributable to ETS. What had not been made clear by the initial publicity was the fact that Ms Bland's offices had a history of complaints including problems with the heating and ventilation that had proved very difficult for the Council to deal with and which affected her

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medical condition. In light of the interpretation given to the Bland settlement the Council's solicitors took the unusual step of issuing a statement commenting on the case (a copy is attached) saying:

> *"We are concerned that the recent publicity on the settlement of her claim may have given a false impression as to the attitude of employers and their insurers in relation to passive smoking claims ... Neither we nor those we represent believe this case goes any way in assisting the arguments as to whether there is any satisfactory medical evidence linking passive smoking and alleged illness".*

20. The Board may also be aware of the publicity given in 1991 to a social security application by a Ms Joan Clay. Ms Clay had argued that she suffered from severe asthma which made her "extremely sensitive" to tobacco smoke, and that on a number of occasions she suffered breathlessness and chest pains after exposure to tobacco smoke from her fellow workers. The Commissioner's decision was limited to the issue of whether, on the facts of this case, there was an "accident" for the purposes of section 50(1) of the Social Security Act 1975. Little factual or medical evidence was presented by her employers in opposition to the application. In finding in Ms Clay's favour the Commissioner noted that the finding that an "accident" had occurred could not *"be taken as importing a decision as to the origin of any injury or disability suffered by the claimant"*. In addition, he stated that:

> *"There can be little doubt that the ordinary case of alleged injury or disease suffered by employees as a result of having to work with smoking fellow employees could not come within the case-law definition of the word "accident" as it is used in [the] Social Security Act 1975 ... My decision is no precedent for other cases where it may be alleged that there has been a deleterious effect from the gradual day to day process of employees being obliged to inhale other employees' tobacco smoke."*

A separate inquiry of the medical evidence had to follow to determine whether or not there had been any resulting loss of faculty. There has been no report of Ms Clay having advanced her case further towards a ruling whether her medical condition actually entitled her to benefits.

21. Claimants may suggest that the findings by the trial judge, Mr Justice Morling, in the AFCO -v- TIA case in Australia may be relied on to support the claim that ETS has been judicially held to cause disease. That would be to interpret the Australian case inaccurately. On 17 December 1992, the full Federal Court decided the case on appeal and the appeal judges unanimously rejected the lower Court's finding that cigarette smoke causes certain diseases in non-smokers, and found that there was a continuing scientific controversy that was a matter for scientists and not the court to resolve. Mr Justice Sheppard stated:

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"His Honour's judgment, and also that of Hill J which I have had the advantage of reading, shows that the question whether passive smoking causes disease in non-smokers is a question upon which scientific research and discussion is continuing. It has been the subject of much research and consideration by many learned people since [1986]. There are those who are satisfied of a causal link and those who are not."[12]

Mr Justice Hill stated:

"At the end of the day, the question of the relationship between environmental tobacco smoke and disease is a matter for scientists trained in the area, it is not a matter for a court of law which is ill-equipped to determine it and to make the skilled judgments upon which such a question depends. It should, accordingly, be borne in mind that the court, in the present proceeding, is not deciding whether environmental tobacco smoke does in fact cause disease."[13]

ETS Claims Against Tobacco Manufacturers and others

22. It has been suggested in reports that some claims might be brought directly against tobacco manufacturers by claimants who allegedly suffer injury as a result of exposure to ETS. In order to succeed in such an action, a claimant would have to prove that the relevant tobacco company owed a duty of care to members of the general public at large who were exposed to ETS, that the tobacco company's conduct gave rise to a cause of action and that the claimant's injury was caused by exposure to ETS resulting from the tobacco company's breach of its duty. Some of the difficulties with such a case have been addressed in the foregoing discussion of ETS claims against employers and those comments are equally relevant to ETS claims made against the tobacco manufacturers. However, a further difficulty faced by claimants in such cases is the manufacturers' lack of control over the social, workplace and other situations in which the products are used. A claimant would have to show that a manufacturer had an obligation to provide warnings or take other action with respect to persons other than the consumers of its products, that such warnings or action would in fact have been acted upon by others, that had they been acted upon the claimant's injury would not have occurred, and that the claimant was not otherwise aware of the claimed risks of ETS. If he was aware of the claimed risks, he would have to show why he nevertheless tolerated its presence.

23. In any action the claimant must of course identify the correct defender. Many tobacco companies have marketed tobacco products in the UK and in any given situation ETS is likely to have been made up of smoke from various tobacco manufacturers' products. In order to succeed in establishing liability the claimant must prove that his injuries are attributable to the product

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produced by the defender manufacturer in question (Wilsher). The claimant's burden of proving that his injuries are attributable to ETS from any one tobacco company's product is almost certain to present an insurmountable obstacle in all ETS claims brought against tobacco manufacturers.

24. It has even been suggested in some reports that there may be solicitors looking to bring claims by children against their parents over ETS in the home. (There is a press report of legal aid applications in England on behalf of two children already having been turned down). Such claims (and funding them with legal aid) could give rise to complex issues of public policy. Aside from public policy, there must be the greatest doubt as to the success of any such action since any duty of care a Court might be prepared to find owed to a child in these circumstances would be highly circumscribed. Any claim brought by a child against its parents could be expected to face similar difficulties to those described above in relation to employers.

Expenses

25. It can be seen from the above that any pursuer who wishes to pursue an ETS claim faces formidable difficulties. It must seriously be questioned whether the facts in any individual case will ever be likely to result in a decree in favour of a pursuer in Scotland.

26. Moreover, it is apparent that the expenses which will be involved in dealing with the relevant issues outlined above are likely to be extremely high. A considerable amount of medical, scientific and other expert evidence will be required on complex and controversial issues. There will be a mass of factual evidence and investigations into the medical history and lifestyle of each individual pursuer. Documents covering many years would be involved. The Board may consider that the expenses of conducting the litigation will be such that no pursuer will be able to show his action is viable, particularly bearing in mind the Board's right to recover expenses from the pursuer, thereby almost certainly exhausting any damages awarded.

27. There may be many potential pursuers who are not eligible for legal aid. It must be a significant factor in deciding what support the Board should give to assess whether such individuals would when properly advised, personally be prepared to incur the expenses and related cost of pursuing litigation of this type. If such persons are not prepared to fund such litigation personally, it is difficult to see how the test referred to at paragraph 2(i) above could be viewed as having been met.

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Legal Aid and The Absence Of 'Generic Issues'

28. As discussed above, each case requires findings on a series of individual issues. There are no "generic" or common issues in ETS cases. Recent pharmaceutical litigation has proceeded on the basis that before the vast majority of individual claims had been investigated, it was sensible to fund (at considerable cost) the investigation of a number of issues which, it was suggested, would be common to many individual claims. The supposition was that further publicity would recruit further plaintiffs and if their cases were subsequently analysed, the issues which would arise in them would include the "generic" issues. However, what was in fact sanctioned was a general enquiry into all the facts and circumstances surrounding the supply of a product over many decades. This approach totally ignores the issues which in fact arise in individual claims and does not and cannot assess the viability of pursuing any individual claim or investigating any individual issue. As is apparent from these representations, legal aid should not be granted to investigate so called "generic" issues in ETS claims, since none exists

Is Co-ordination Of Individual Actions Justified?

29. It may be suggested that ETS claims should proceed as a co-ordinated group action. In England certain co-ordinated litigation arrangements have been recognised as appropriate for the efficient management and economical disposal of a large number of individual claims in which there is sufficient "common ground" or "commonality of issues":

> *"In the 'instant' disaster actions, causation and negligence will often raise identical issues for each plaintiff, though each plaintiff will have to be considered individually on the issue of damages.... In the case of pharmaceutical products, the issues involved in liability are likely to be more complex. Patients of differing susceptibilities will have taken different quantities of the drug over different periods of time and during different stages of the advancement of scientific knowledge, so that the issue of negligence or 'defective product' will vary. Equally patients taking the same drug may complain of different ill-effects, and so the defence under the Statutes of Limitation, or contributory negligence, may be pleaded against some plaintiffs and not against others....Pharmaceutical actions, and others like them, may require very different procedural treatment from other classes of actions, like the 'instant disaster' actions where there is usually more community of issues"*. (Guide for Use in Group Actions Supreme Court Procedure Committee, May 1991 page 6).

30. ETS litigation simply would not lend itself to the arbitrary imposition of co-ordinated arrangements because of the lack of any commonality between individual claims. It is no answer to this obvious lack of commonality to claim that there is some general issue, such as whether ETS is harmful, the answer to which would resolve a significant number of individual cases and thereby justify

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co-ordination of individual cases. The essential causation issue is whether ETS actually caused the injury of which the pursuer complains: this requires a highly individualistic enquiry which in every case will turn on the personal health and lifestyle of the particular pursuer. Consequently, it would be inappropriate to fund any ETS claims on a co-ordinated group basis.

Conclusions

31. The comments in this document illustrate some of the difficult legal and factual issues which will have to be determined in any individual ETS claim. Claimants face enormous difficulties in establishing individual causation, in identification of the correct defender to any action, and on fundamental questions of the existence and extent of and proof of breach of duties of care.

32. Very careful scrutiny of each individual case should be undertaken by the Board before it is decided to grant legal aid to support proceedings in that case. Each of the specific matters raised above needs to be considered in evaluating whether there are reasonable grounds for taking proceedings in that case having regard to (a) the prospects of success and (b) the issue of whether the action is one that a person with private means would pursue given the likely cost, the likely recovery after the exercise of the Board's right to recover expenses from the pursuer, and the exposure to the expenses of the defender (if unsuccessful). Unless these tests are satisfied, reasonable grounds for funding any claim do not exist.

33. Legal aid should not be granted separately for costly research of any so-called "generic" issues. No "generic" issues arise in ETS claims. Co-ordinated arrangements are not appropriate.

34. It is submitted that legal aid funding should not be given for any such claims.

25th July, 1993

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